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In the Supreme Court of the United States

OCTOBER TERM, 1974

HAROLD FRANKS AND JOHNNIE LEE, PETITIONERS

v.

BOWMAN TRANPORTATION COMPANY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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INTEREST OF THE AMICI CURIAE

The United States and the Equal Employment Opportunity Commission are responsible for the enforcement of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.*, which prohibits discriminatory employment practices. The decision of the court of appeals in this case, insofar as it restricts the scope of the relief that may be fashioned by district courts to remedy unlawful refusals to hire persons on account of their race, directly affects those responsibilities. The United States and the Commission accordingly participated as *amici curiae* in the court of appeals in support of petitioners' petition for rehearing.

STATEMENT

This class action was brought in the United States District Court for the Northern District of Georgia, challenging as racially discriminatory certain employment practices of the respondents, an interstate trucking company and a labor union. With respect to the matters pertinent here, the district court found that, prior to January 1972, the company followed an unlawful practice of excluding blacks from employment as over-the-road drivers on account of their race.[1]

The court enjoined further discrimination in violation of Title VII of the Civil Rights Act of 1964 (Pet. App. A65-A66) and ordered the company to give previously rejected black applicants priority in consideration for employment to fill vacancies as over-the-road drivers (*id.* at A67). It declined, however, to require that non-named members of the affected class be given back-pay awards or retroactive seniority credit when hired (*id.* at A54).

The court of appeals reversed the district court's denial of back-pay to non-named class members *(id.* at A37-A40) but affirmed its denial of retroactive seniority credit (*id.* at A29-A31). The court of appeals held that relief in the nature of seniority credit, requiring the creation of "constructive seniority for applicants who have never worked for the company" (*id.* at A30), is prohibited by Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h), which provides that "it shall not be an unlawful employment practice for an employer to apply dif-

[1]The company followed "an unwritten policy against hiring Blacks" as over-the-road drivers prior to 1970 (Pet. App. A50; see also *id.* at A17). Although several blacks were hired for such jobs starting in 1970 (*id.* at A17-A18, A50), the district court found that black applicants were "effectively denied employment as over-the-road drivers prior to January 1, 1972" (*id.* at A67).

ferent standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * ." "The discrimination which has taken place in a refusal to hire," the court of appeals stated, "does not affect the bona fides of the seniority system" (Pet. App. A30).

DISCUSSION

The Court should grant certiorari in this case to resolve the important question whether a district court, in fashioning a remedy for discriminatory refusals to hire, is precluded from granting seniority credit to qualifed persons who were illegally denied employment because of their race. The holding of the court of appeals that seniority credit is barred rests upon a misinterpretation of the provisions of the Civil Rights Act of 1964 and conflicts with recent decisions of other circuits. If left undisturbed, that holding would seriously impair the remedial effectiveness of the Act and hamper the enforcement efforts of the Department of Justice and the Equal Employment Opportunity Commission by unduly limiting the authority of the district courts to eliminate the effects of past hiring discrimination.

1. Insofar as the court of appeals held that Section 703(h) of the Act prohibits the granting of seniority credit to the victims of the company's discriminatory hiring policy, the decision conflicts with the Sixth Circuit's decision in *Meadows* v. *Ford Motor Co.*, Nos. 74-1258, *et al.*, decided January 24, 1975. The district court in *Meadows* found that the company had unlawfully denied production-line employment to women on account of their sex; but, like the district court in the present case, it declined to grant back-pay and seniority-credit relief to qualified members of the affected class of women applicants.

The Sixth Circuit held, however, that the Act's remedial objective—"to make the injured party whole to the extent that that can be done" (slip op. 8)— requires the district courts to grant back-pay and seniority-credit relief in appropriate cases, notwithstanding the practical difficulties that may be encountered in framing such relief. "There is," the court of appeals stated, "no prohibition to be found in the statute we construe in this case which prohibits retroactive seniority" (slip op. at 19). The court recognized that, "in dealing with job seniority," it is necessary to consider not only the interests of those who were denied employment on account of their sex, but also "the interests of the workers who might be displaced as well as the interests of the employer in retaining an experienced work force" (*ibid.*). It stated, however, that "[w]e do not assume, as our brethren in the Fifth Circuit appear to * * * , that such reconciliation is impossible" *(ibid.)*.[2]

The decision in the present case also conflicts with the Third Circuit's decision in *Jurinko* v. *Edwin L. Wiegand Co.*, 477 F. 2d 1038, vacated and remanded on other grounds, 414 U.S. 970. In that case, an employer refused to hire two women job applicants because of their sex.[3]

[2]The Sixth Circuit recognized, moreover, that the problems involved in assigning seniority credit for purposes of lay-offs and job-bidding are reduced or eliminated in the context of assigning such credit for purposes of "the fringe benefits of employment" (slip op. at 19). "Where vacation schedules or pension rights (or other fringe benefits) are determined by date of hire, we perceive no reason why that date in these cases should be other than the date which the trial court fixes as the date when the employee would have been hired, absent the illegal hiring practice which the District Court has identified and enjoined" (slip op. at 19-20).

[3]Both women had previously been employed by the company for several years prior to December 1953, but that fact did not bear upon the court of appeals' disposition of the issues relating to the company's discriminatory refusal to rehire them in 1966. The women's legal posture was no different from that of new applicants who had never been employed by the company.

The relief granted by the district court did not include seniority credit, but the court of appeals directed the district court on remand "to expand the award to the plaintiffs to include seniority" (477 F. 2d at 1047). The court of appeals stated *(id.* at 1046):

> We can perceive no basis for the trial court to have refused to award back seniority or for its conclusion that "the plaintiffs are to be offered employment in production with the company, of course, as new employees." Seniority is, of course, of great importance to production workers for it determines both opportunities for job advancement and the order of layoff in the case of a reduction in a company's operating forces. It is our view that the plaintiffs are entitled to seniority and back pay dating from the time of the discriminatory employment practice up to the time they are actually reinstated. Only in this way will the present effects of the past discrimination be eliminated.

Retroactive seniority to place identified victims of hiring discrimination in the position they would have been in but for the discrimination has also been held proper by some district courts[4] and has been included in consent decrees negotiated by the Department of Justice.[5]

[4]See, *e.g.*, *United States* v. *Lee Way Motor Freight, Inc.*, 7 EPD para. 9066, p. 6500 (W.D. Okla.); cf. *Dobbins* v. *Local 212, International Brotherhood of Electrical Workers*, 292 F. Supp. 413, 450-451 (S.D. Ohio), affirmed as modified, 472 F. 2d 634 (C.A. 6).

[5]*E.g. United States* v. *Roadway Express, Inc.*, C.A. No. C-68-321 (N.D. Ohio) (consent decree entered September 1, 1970, partially reported at 2 EPD para. 10,295, p. 1176 affirmed, 457 F. 2d 854 (C.A. 6); *United States* v. *Navajo Freight Lines, Inc.*, C.A. No. 72-116-MML (C.D. Cal.) (supplemental order to consent decree entered January 15, 1973); *United States* v. *Pilot Freight Carriers, Inc.*, C.A. No. C-143-WS-71 (M.D. N.C. (consent decree entered October 31, 1972). See also *United States* v. *Georgia Power Co.*, 7 EPD para. 9167 (N.D. Ga.) (parties agreed to order on remand from 474 F.2d 906 (C.A. 5)).

2. The Fifth Circuit's flat prohibition against the granting of any form of seniority credit is an unwarranted departure from the remedial purposes of Title VII. Section 706(g) of the Act, 42 U.S.C. (Supp. III) 2000e-5(g), gives the courts broad remedial authority; it permits them, upon a finding that a violation exists, to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * *, or any other equitable relief as the court deems appropriate." When a violation is found, the Act's objective, as the court of appeals recognized, is "to remedy the effects of past discrimination" and "to make the discriminatee whole as far as possible" (Pet. App. A23-A24). See *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F. 2d 1364, 1375, 1377 (C.A.5); *Head* v. *Timken Roller Bearing Co.*, 486 F. 2d 870, 876-877 (C.A. 6); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 802 (C.A. 4); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 720 (C.A. 7).[6]

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[6]A section-by-section analysis of the 1972 amendments to the Act, presented to the House and the Senate at the time the Conference Report on those amendments was submitted to each body (118 Cong. Rec. 7166-7169, 7563-7567), states with respect to the present Section 706(g) (*id.* at 7168, 7565):

> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present Section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

The effect of the court's holding in the present case, however, would be to bar full relief to persons denied employment because of their race and to allow perpetuation of the effects of the company's discriminatory refusals to hire. The victims of the company's racially discriminatory hiring policy would be permanently disfavored, because their seniority status—for purposes of lay-offs, job-bidding, etc.—would be forever subordinated to the seniority status of whites who were hired in their place.

Section 703(h) of the Act, on which the court of appeals rested its decision in this case, is not a bar to an award of seniority credit. That Section addresses only what constitutes an unlawful employment practice; it does not limit the court's remedial power to prescribe effective relief once a violation is established. See, *e.g.*, *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va.). Moreover, granting appropriate seniority-credit relief in this case would not eliminate the existing seniority system of the company or the union. It would merely give the qualified members of the affected class their rightful place within that system.

The issue here is a narrow one. It is not whether full seniority credit for all purposes must be granted to all members of the affected class who are ultimately hired by the company; it is whether some form of seniority credit *may* be granted in appropriate circumstances to eliminate the effects of past hiring discrimination. The resolution of that issue will not require this Court to determine the precise form that such relief should take in this case. As the Sixth Circuit recognized in *Meadows, supra*, that task, which requires a careful consideration of all the competing interests at stake, properly "lies in the first instance with the District Judge" (slip op. at 19).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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